

**Cohen & Levey Dev. Group LLC v Falco Concrete
Inc.**

2009 NY Slip Op 31391(U)

June 23, 2009

Supreme Court, New York County

Docket Number: 108418/09

Judge: Carol R. Edmead

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDMEAD
Justice

PART 35

COHEN + LEVY DEVELOPMENT GROUP, LLC

INDEX NO. 108418/09

MOTION DATE _____

- v -

FALCO CONCRETE, INC.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

FILED

JUN 24 2009

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the annexed Order, and the Clerk of this Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 6/23/09



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

COHEN & LEVY DEVELOPMENT GROUP LLC.

**HON. CAROL R. EDMEAD,
J.S.C.
TRIAL/IAS Part 35
Index No: 108418/09**

Petitioner,

DECISION & ORDER

- against -

FALCO CONCRETE INC.

Respondent.

FILED
JUN 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X

- Papers Read on this Motion:**
- Petitioner's Order to Show Cause
 - Respondent(s) Opposition
 - Replying Affidavit(s)/Affirmation(s)
 - Exhibits
 - Other

Numbered

Petitioner, Cohen & Levy Development Group LLC., (hereinafter "Petitioner") moves by Order to Show Cause for an Order, Pursuant to Section 39 of the Lien Law of the State of New York, discharging Mechanic's Lien filed by Respondent Falco Concrete Inc. (hereinafter "Respondent") on April 30, 2009, against the property owned by Petitioner, known as 203 East 121st Street a/k/a 2223 Third Avenue, New York, New York (Block 1786, Lot 1, New York County) (hereinafter "Premises"). Said Mechanic's Lien alleges that the price agreed upon by the parties was Five Hundred and Sixty One Thousand (\$561,000.00) Dollars and that the balance due to Respondent is Eighty Six Thousand and One Hundred (\$86,100.00) Dollars.

As per Order to Show Cause dated June 15, 2009, Respondent was served via overnight mail with copy of the Order to Show Cause along with Petition and supporting papers and Petitioner has submitted Affidavit of Service of same to the Court. As per Order, response papers were to be served and filed in Part 35 on or before June 22, 2009. No response papers have been submitted and Respondent has defaulted in appearing before this Court on June 23, 2009. Respondent failed to submit any response or opposition papers. As such, Petitioner's motion is hereby granted.

Petitioner's general contractor, FTIC Construction Corp. (hereinafter "FTIC") retained the services of Respondent to provide labor and material at the Premises. As per the contract dated July 7, 2008 between FTIC and Respondent, Respondent was to receive the sum of Four Hundred and Seventy Five Thousand (\$475,000.00) Dollars for the labor and materials it provided (see Petitioner's Petition Exhibit "A"). Progress payments by Petitioner to Respondent and its suppliers were made as the Respondent performed the labor and provided the materials it was supposed to.

As of March 25, 2009, Respondent, by its president, acknowledged that it was paid the sum of Four Hundred and Fifty Five Thousand (\$455,000.00) Dollars and that it was owed a balance of Nineteen Thousand and Five Hundred (\$19,500.00) Dollars (see Petitioner's Petition Exhibit "B"). On March 26, 2009, Petitioner paid Respondent the sum of Five Thousand (\$5,000.00) Dollars. This was deposited by Respondent on March 27, 2009. On April 8, 2009, Petitioner paid Respondent the sum of Fourteen Thousand and Five Hundred (\$14,500.00) Dollars, representing the final payment due to Respondent directly (see Petitioner's Petition Exhibit "C"). Respondent filed the Mechanic's Lien which is the subject of herein proceeding on April 30, 2009 (see Petitioner's Petition Exhibit "D").

As per documentary evidence submitted to the Court in Petitioner's motion and petition, Respondent was paid the total sum of Four Hundred Seventy Five Thousand and Twenty Five (\$475,025.42) and 42/100, as of April 14, 2009, for the labor and materials is provided to Petitioner. As such, all amounts due to Respondent as per contract of July 7, 2008 were paid in full and there was no outstanding balance due to Respondent by Petitioner on April 20, 2009, when Respondent filed its Mechanic's Lien.

Pursuant to Section 39, the Lien Law provides that a willfully exaggerated lien is void. "In any action or proceeding to enforce a machine's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien, the lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have the right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice."

In addition, pursuant to Section 39-a, "where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of willful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon."

In the instant case, the Respondent, as per its Mechanic's Lien filed on April 20, 2009, claims that the contract price was Five Hundred and Sixty One Thousand (\$561,000.00) Dollars and that the balance due to Respondent was Eighty Six Thousand and One Hundred (\$86,100.00) Dollars. Petitioner presented documentary evidence establishing that the contract price was Four Hundred and Seventy Five Thousand (\$475,000.00) Dollars and that as of April 14, 2009, before Respondent filed its Mechanic's Lien, all amounts due to Respondent were paid in full.

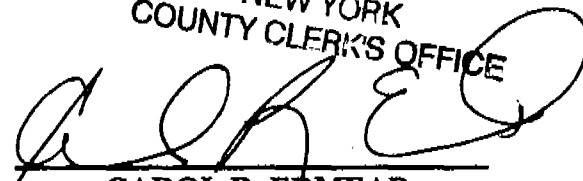
Where there is willful exaggeration in the amount of a mechanic's lien as filed, the entire lien is forfeited. *Goodman v. Del-Sa-Co Foods, Inc.* 15 NY2d 191 (1965). In the instant case, Respondent failed to respond to Petitioner's papers or dispute same. As such, the Court is to take Petitioner's assertions as true, especially when read in conjunction with the documentary evidence submitted by Petitioner. As such, the Court finds that the Respondent has willfully exaggerated the amount of the Mechanic's Lien against the Petitioner, and that pursuant to Section 39-a of the Lien Law, Petitioner is entitled to collect damages in the amount prescribed by the Statute, in sum of Eighty Six Thousand and One Hundred (\$86,100.00) Dollars, which is "the amount equal to the difference by which the amount claimed to be due as stated in the notice of lien exceeded the amount actually due or to become due thereon." It is hereby

ORDERED that the Mechanic's Lien filed by Respondent is **DISCHARGED** and that judgment for damages in favor of Petitioner and against Respondent in sum of Eighty Six Thousand and One Hundred (\$86,100.00) Dollars be entered.

This constitutes the **DECISION** and **ORDER** of this Court.

Dated: June 23, 2009
New York, New York

ENTER:

FILED
JUN 24 2009
NEW YORK
COUNTY CLERK'S OFFICE

CAROL R. EDM EAD,
J.S.C.
HON. CAROL EDM EAD